FILE
JUL 8
HAROLD B. WIL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 108

PHILIP LANDES,

Appellant,

—vs.—

THE DOMESTIC RELATIONS COURT OF THE CITY OF NEW YORK, Family Court Division, County of Bronx, HON. LOUIS LORENCE, individually and as a Justice thereof,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OPPOSING MOTION TO DISMISS APPEAL

PHILIP LANDES,
Appellant *pro se*,
Room 1212,
521 Fifth Ave.,
New York, N. Y.

INDEX.

PAGE

Preliminary Statement 1

Point I—This Court is Not Conclusively Bound by Determinations Made by State Courts on Federal Constitutional Questions and the Compact Question is Only One of Four Constitutional Questions of National Importance Presented by this Appeal (Appellees' Brief—Point 3) 3

Point II—An Appeal by Permission to a Lower Appellate Court After an Appeal as of Right Had Been Dismissed by the New York Court of Appeals was Not Proper in the Instant Case (Appellees' Brief—Point I—Argument 1) 5

Point III—The Appellees Have Not Substantiated Their Contention that the Judgment is Not Final Whereas the Prevailing Legal Authority Sustains Appellant's Contention that the Judgment is Final (Appellees' Brief—Point I—Argument 2) 7

Point IV—The Contention that the Prohibition Order Was Denied in the Sound Discretion of the Court is a Conclusion that is Not Substantiated by the Record or by Prevailing Legal Authority (Appellees' Brief—Point II) 9

Point V—The Introductory Section of Appellees' Brief is Replete with Inferences, Innuendoes, and Matters Not Directly Related to this Appeal 10

Conclusion 12

PAGE

Cases Cited.

Bandini Co. v. Superior Court, 284 U. S. 8 ..... 8, 11
Central Union Tel. Co. v. City of Edwardsville, 269 U. S. 190 7
Clark v. Williard, 292 U. S. 112 ..... 8, 11
Department of Banking v. Pink, 317 U. S. 264 8
Duncan v. Smith, (Kentucky) 262 S. W. 2d 373 3
Ellis v. Dixon, 23 U. S. Law Week 4278 7
Gardner v. Domestic Relations Court, 54 N. Y. S. 2d 672 9
Hess v. Reynolds, 113 U. S. 73 4
Hurtado v. California. 110 U. S. 516 12
Hyde & Oglesby v. Stone, 61 U. S. 170 4
Lapchak v. Baker, 298 N. Y. 89 5
Madruga v. Superior Court, 346 U. S. 556 11
Market Street R. Co. v. Railroad Comm., 324 U. S. 548 8
Matter of Culver Contrg. Corp. v. Humphrey, 268 N. Y. 26 9
Matter of Hogan v. Court of General Sessions, 296 N. Y. 1 9
Parker v. Illinois, 233 U. S. 571 6
Payne v. Hook, 74 U. S. 425 4
Teeval Co. v. Stern, 301 N. Y. 346 6
Titus v. Wallick, 306 U. S. 282 6
Young v. Ragen, 337 U. S. 235 6

Texts Cited.

Jurisdiction of the Supreme Court of the United States (1951 edition by Wolfson & Kurland) 7
Supreme Court Practice (1954 edition by Stern & Gressman) 8
The Powers of the New York Court of Appeals (1952 edition by Cohen & Karger) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 108

PHILIP LANDES,

Appellant,

—vs.—

THE DOMESTIC RELATIONS COURT OF THE CITY OF NEW YORK, Family Court Division, County of Bronx, HON. LOUIS LORENCE, individually and as a Justice thereof,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OPPOSING MOTION TO DISMISS APPEAL

PRELIMINARY STATEMENT.

By means of technical objections which are lacking in merit and are not controlling, and by means of inferences and conclusions not substantiated by fact or law, the appellees are seeking to have this Court dismiss this appeal and thereby

delay or prevent an adjudication of constitutional questions of substantial public importance.

This appeal differs from the usual case brought before this Court in that it directly involves substantial rights of the federal government. It involves the rights of the United States Congress in that the several States have inadvertently entered into agreements and/or compacts with each other without the required consent of Congress. (Jurisdictional Statement, pp. 18-22.)[1] It involves the rights of the federal judiciary in that the several States have set up an interstate judicial system, which if carried to a logical conclusion, would completely nullify the jurisdiction of the federal courts in controversies between citizens of different States. (Jurisdictional Statement, pp. 22-26.) Significantly, the Constitution makes no provision for the safeguarding of these federal rights, except, that an individual citizen, in seeking redress for his own grievances, may bring these matters to the attention of this Court.

In replying to appellees' brief, consideration will be given first, to Point Three which deals with constitutional questions, then to Points One and Two which deal with procedural questions, and finally, the introductory section which deals with matters not directly related to this appeal.

---

[1] It is noted that Congress refused to pass legislation on the subject matter of these interstate support laws inasmuch as it was believed to be unconstitutional. (Jurisdictional Statement, p. 21, footnote.)

POINT I.

THIS COURT IS NOT CONCLUSIVELY BOUND BY DETERMINATIONS MADE BY STATE COURTS ON FEDERAL CONSTITUTIONAL QUESTIONS AND THE COMPACT QUESTION IS ONLY ONE OF FOUR CONSTITUTIONAL QUESTIONS OF NATIONAL IMPORTANCE PRESENTED BY THIS APPEAL (APPELLEES' BRIEF—POINT 3).

The appellees claim in Point Three of their brief (p. 12) that: "It would indeed be astounding if a statute enacted in some 40 States were now held to be in violation of the Federal Constitution." The principal argument used is that in the case of *Duncan* v. *Smith,* (Kentucky) 262 S. W. 2d 373, the highest State court upheld the constitutional validity of the Uniform Support of Dependents Law.

The case of *Duncan* v. *Smith* was a declaratory judgment proceeding and the attorney generals of thirteen States filed briefs as *amici curiae.* The constitutional questions raised in the *Duncan* case and the arguments used were only partially the same as in the instant case, nor were the facts the same.

This Court's definition of a compact, the type of compact this Court will sanction, and the required consent of Congress (Jurisdictional Statement, pp. 18-22) are points of law which are not contained in the decision of *Duncan* v. *Smith, supra.* It is also interesting to note that the review and guidance of this Court was not sought on the federal constitutional questions involved in the case of *Duncan* v. *Smith* even though the matter was of sufficient public importance to induce the attorney generals of thirteen States to file briefs as *amici curiae.*

The cases cited at page 14 of appellees' brief deal with rulings by the several States on the constitutionality of the

interstate support laws. These citations, three of which are included in the Jurisdictional Statement, serve to strengthen appellant's arguments as to the public importance of the questions presented.

The appellees have attempted to belittle the importance of the other federal constitutional questions presented by this appeal (p. 13 of appellees' brief: "The other contentions advanced by appellant warrant little comment.").

The second question raised by appellant deals with the constitutional powers of the federal courts. The trial procedures outlined in the interstate support laws represent an attempt by the States to circumvent or nullify the powers of the federal courts in controversies between citizens of different States. That this Court will not sanction such actions is indicated in *Hyde & Oglesby* v. *Stone*, 61 U. S. 170, 175; *Payne* v. *Hook*, 74 U. S. 425, 430; *Hess* v. *Reynolds*, 113 U. S. 73, 77. (Jurisdictional Statement, pp. 22-26 inclusive.)

The third question raised by appellant deals with the applicability of the Sixth Amendment in these interstate trials. Inasmuch as the Sixth Amendment relates to criminal matters the appellees have tried to indicate that the laws in question are not criminal. The California law is on its face both a criminal and civil law. (Jurisdictional Statement, p. 57.) The New York law though it purports to be civil is essentially a criminal law. See Exhibit "A"—Warrant of Arrest and Exhibit "B"—Notice from District Attorney, pp. 33 and 35 of record now before this Court.[2]

The fourth constitutional question on equal protection raised by appellant has been completely ignored by appellees.

---

[2] The acts performed against appellant by New York State in behalf of the State of California are not based on any matters directly involving the public welfare of either State. The acts are performed to fulfill obligations under an interstate compact and the individual citizen regardless of guilt or innocence, thereby becomes a pawn of the State.

The fact that the State of New York is arbitrarily and capriciously depriving one of its own citizens of his liberty and property on demand of the State of California, whereas California would not molest one of its own citizens under similar circumstances, is a novel question on equal protection that merits the attention of this Court. (Jurisdictional Statement, p. 33.)

POINT II.

AN APPEAL BY PERMISSION TO A LOWER APPELLATE COURT AFTER AN APPEAL AS OF RIGHT HAD BEEN DISMISSED BY THE NEW YORK COURT OF APPEALS WAS NOT PROPER IN THE INSTANT CASE (APPELLEES' BRIEF—POINT I—ARGUMENT 1).

The appellees indicate in Point 1 (p. 7) that after appellant's appeal was dismissed by the Court of Appeals of the State of New York, the appellant should have taken advantage of Section 592 of the Civil Practice Act and taken his appeal by permission to the Appellate Division of the New York State Supreme Court, a lower appellate court.

At the outset it should be noted that the appellees have disregarded the contents of the Notice of Appeal that was served on them in taking this appeal to the Court of Appeals of the State of New York under the provisions of Section 588(4) of the Civil Practice Act.[3] (A copy of this Notice of Appeal is contained in the record now before this Court. R., 16, 17.)

---

[3] Section 588, Subdivision 4, of the Civil Practice Act provides a means of giving preference to cases containing constitutional questions. This preference is limited to the constitutional questions only, and Section 588, Subdivision 4, may not be taken advantage of for the purpose of adjudicating other questions. Lapchak v. Baker, 298 N. Y. 89. This provision of the Civil Practice Act is in conformance with Article VI, Section 7, Subsection 2 of the New York State Constitution. Section 593 referred to by appellees in a footnote on page 2 of their brief was also intended to give preference to cases containing constitutional questions over other cases.

The Notice of Appeal was limited to constitutional questions[4] and the non-constitutional questions were waived. This is in accordance with established New York procedure. In "The Powers of the New York Court of Appeals" by Cohen & Karger (1952) it is stated in the section dealing with appeals under Section 588(4) of the Civil Practice Act, p. 263:

> "There are also other situations in which a private party appellant may eliminate a possible non-constitutional issue from the case by waiving his rights in that regard, thereby leaving the constitutional question as the only issue in the case." (A footnote cites *Teeval Co.* v. *Stern*, 301 N. Y. 346, as authority.)

Inasmuch as the Court of Appeals necessarily passed upon the constitutional questions in dismissing the appeal and denying relief (*Young* v. *Ragen*, 337 U. S. 235, 238; *Titus* v. *Wallick*, 306 U. S. 282, 284) and the non-constitutional questions had been waived in the Notice of Appeal there were no grounds left on which to appeal to the Appellate Division, a lower appellate court.

Even assuming that the non-constitutional questions were not waived in the instant case, the taking of the appeal to the Appellate Division would have been construed as a waiver of the constitutional questions. With the constitutional questions thus eliminated, an appeal to this Court would have been barred. The cases cited by appellees favor the respondent with respect to this point of law. *Parker* v.

---

[4] The Notice of Appeal to the Court of Appeals reads in part (R. p. 17):

> "PLEASE TAKE FURTHER NOTICE that the petitioner's appeal herein is based solely upon United States and New York State constitutional questions * * *."

Illinois, 233 U. S. 571; *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U. S. 190.

The case of *Ellis* v. *Dixon*, 349 U. S. (?), 23 U. S. Law Week 4278, cited by appellees at page 10 of their brief is not applicable. In the *Ellis* case there was no complete record, for this Court and the New York Court of Appeals to review, whereas in the instant case there is a complete record of facts and law, including facts, points of law, and arguments presented by the appellees. The merits of the *Ellis* case and the appellate procedure involved were likewise not the same as in the instant case.

POINT III.

THE APPELLEES HAVE NOT SUBSTANTIATED THEIR CONTENTION THAT THE JUDGMENT IS NOT FINAL WHEREAS THE PREVAILING LEGAL AUTHORITY SUSTAINS APPELLANT'S CONTENTION THAT THE JUDGMENT IS FINAL (APPELLEES' BRIEF POINT I— ARGUMENT 2).

At the very outset of their brief the appellees state on page 1 (footnote) that the judgment on which the appellant is invoking the jurisdiction of this Court was erroneously referred to as a final judgment. Again on page 10 the appellees advance the same contention. Not a single case has been cited by them to substantiate their conclusion.

In the instant case there can be no dispute that the unqualified dismissal of appellant's appeal by the Court of Appeals of the State of New York was a final determination with respect to appellant's rights. After the dismissal there was nothing left for appellant to do with respect to this writ of prohibition proceeding.

In Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States" (1951 edition by Wolfson &

Kurland), it is stated in Section 36, at page 69, with respect to finality of judgment:

> "In proceedings in prohibition, habeas corpus, coram nobis, mandamus and quo warranto, it is sufficient, for purposes of review by the Supreme Court, if the judgment of the highest court of the state finally determines the right of the petitioner to the writ sought. These proceedings are considered as independent, even when in fact incidental to some other proceeding. * * *"

Again, in "Supreme Court Practice" (1954 edition by Stern and Gressman), it is stated, page 74:

> "The principles heretofore discussed apply with equal force to proceedings in prohibition, mandamus, habeas corpus, quo warranto, and for writ of error coram nobis. In each instance a judgment to be final must conclusively determine the right of the applicant to the writ sought. See Madruga v. Superior Court, 346 U. S. 556, 557, n. 1, for example of a state court judgment finally disposing of a writ of prohibition as being a final judgment reviewable under 28 U. S. C. 1257."

Other cases sustaining the finality of this judgment are: *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 14; *Clark* v. *Williard,* 292 U. S. 112, 117-119; *Department of Banking* v. *Pink,* 317 U. S. 264, 268; *Market Street R. Co.* v. *Railroad Commission,* 324 U. S. 548, 551.

POINT IV.

THE CONTENTION THAT THE PROHIBITION ORDER WAS DENIED IN THE SOUND DISCRETION OF THE COURT IS A CONCLUSION THAT IS NOT SUBSTANTIATED BY THE RECORD OR BY PREVAILING LEGAL AUTHORITY (APPELLEES' BRIEF—POINT II).

In Point 2 of their brief (p. 10) the appellees have indicated that the dismissal of the appellant's appeal by the Court of Appeals of the State of New York rested on the ground that a prohibition order may properly be denied in the sound discretion of the Court. This allegation represents sheer speculation on the part of the appellees and there is nothing in the record now before this Court that would support appellees' contentions.

This point was not raised by appellees in the trial court, was not passed upon by the trial court (see opinion and order of the trial court—Jurisdictional Statement, pp. 39-41) and although used as an argument was not passed upon by the Court of Appeals (see opinion and order of the Court of Appeals—Jurisdictional Statement, pp. 37-39).

The cases cited by the appellees to sustain their contention that a prohibition order may be denied in the sound discretion of the court, are: *Matter of Culver Contrg. Corp.* v. *Humphrey,* 268 N. Y. 26, 39; *Matter of Hogan* v. *Court of General Sessions,* 296 N. Y. 1, 8. The appellees' contentions are based on their interpretation of dicta contained therein, whereas the actual decisions sanctioned the granting of the writs.

Furthermore, in the case of *Gardner* v. *Domestic Relations Court, et al.,* 54 N. Y. S. 2d 672, a writ of prohibition was granted against a Justice of the Domestic Relations Court, the decision indicating that a writ of prohibition could be resorted to in aid of substantial justice and to forbid the exercise of an unauthorized power. (Jurisdictional State-

ment, p. 15.) In the instant case the constitutional questions raised by appellant were and are indicative of the use of an unauthorized power.[5]

POINT V.

THE INTRODUCTORY SECTION OF APPELLEES BRIEF IS REPLETE WITH INFERENCES, INNUENDOES, AND MATTERS NOT DIRECTLY RELATED TO THIS APPEAL.

The introductory section of appellees' brief (pp. 1-6 inclusive) contains many facts taken out of context and a number of erroneous conclusions are noted. An attempt to controvert each item would involve entanglement in a morass of detail not directly related to this appeal. A few examples will substantiate appellant's contentions.[6]

On page 2 of their brief appellees indicate that the petition for support originated in the Superior Court of the State of California and was transmitted to the Domestic Relations Court of the City of New York. They have failed to indicate in conjunction therewith that the petition for support was used as a criminal adjunct to an uncontested divorce action in a foreign State. (Jurisdictional Statement, p. 7.) The action for divorce and the action for support were instituted on the same day in the same California Court.

The decision of Mr. Justice Lorence and matters relating thereto (Appellees' Brief, pp. 5-6) are not brought into ques-

---

[5] It is to be noted that in New York State an action for a writ of prohibition is instituted by means of a show cause order which is signed by a Justice of the New York State Supreme Court. At the time of the signing of the show cause order the Justice may exercise his discretion and refuse to sign the order if he believes that there is no prima facie case. In the instant case the show cause order was duly signed by Mr. Justice Hammer of the New York State Supreme Court (R., 20.)

[6] Pages 7-17 inclusive, of the Jurisdictional Statement contain a complete and detailed presentation of proceedings had in this matter.

tion on this appeal inasmuch as this appeal is based on an independent lawsuit which seeks to restrain Mr. Justice Lorence or any other Justice of the Domestic Relations Court from entering or enforcing any order under the interstate support laws. (*Madruga* v. *Superior Court,* 346 U. S. 556, 557, n. 1; *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 14; *Clark* v. *Williard,* 292 U. S. 112, 117-119.)[7]

At page 4 of their brief, the appellees complain that "the prohibition order sought by appellant * * * would have served to enable the appellant to persist in his refusal to provide for the support of his infant daughter." This statement is entirely unwarranted and is not in order. The fact that the appellant was deprived of his child under circumstances that could be construed as kidnapping, and that the appellant has neither seen his child nor received any word as to her welfare in more than four years (Jurisdictional Statement, p. 7) seems to be of no concern to the appellees.

---

[7] The proceedings in the Domestic Relations Court were arbitrarily terminated on December 22, 1954, while this present prohibition proceeding was pending in the New York Court of Appeals. The appellees then used this termination of proceedings in the Domestic Relations Court as one of their arguments in the Court of Appeals. At this last hearing in the Domestic Relations Court the appellant was denied the right to further cross-examine the complainant by written interrogatories, was denied the right to call witnesses in his own behalf, and in spite of constitutional objections, was compelled to be a witness against himself. (Jurisdictional Statement, p. 31, footnote.)

CONCLUSION.

The appellant has established by a preponderance of legal evidence that the contentions of the appellees are without merit. The points of argument raised by the appellees are invalid in law, and unimportant in substance, compared to the real basic issues of encroachment on the powers of the federal government and flagrant disregard of individual rights.

> "It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. * * * Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects is not law, whether manifested as the decree of a personal monarch or an impersonal multitude." *Hurtado* v. *California*, 110 U. S. 516, 535-536.

The appellant therefore again prays that this Court take jurisdiction over this cause.

Respectfully submitted,

PHILIP LANDES,
Appellant *pro se*,
Room 1212,
521 Fifth Avenue,
New York, N. Y.

July, 1955.